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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

NIKE, INC., *et al.*,

Petitioners,

—v.—

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

The Decision Below Improperly Extends the Commercial Speech Doctrine to Justify the Suppression of Speech in Violation of Core First Amendment Principles 6

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

44 Liquormart, Inc v. State Board of Rhode Island,
517 U.S. 484 (1996) 9, 11, 12, 13

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 9, 10, 12

Bigelow v. Virginia,
421 U.S. 809 (1975) 9

Board of Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989) 15

Bolger v. Youngs Drugs Products Corp.,
463 U.S. 60 (1983) 9, 14, 15

Bose Corporation v. Consumers Union,
466 U.S. 485 (1984) 6, 7, 13, 22

Brandenburg v. Ohio,
395 U.S. 444 (1969) 11

Carey v. Population Services Int'l,
431 U.S. 678 (1977) 11, 12

Central Hudson Gas & Electric Co. v. Public Service Commission,
447 U.S. 557 (1980) 7, 9, 10, 15

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 7

Connick v. Meyers,
461 U.S. 138 (1983) 6, 7, 14

Consolidated Edison Co. v. New York Public Service Commission,
447 U.S. 530 (1980) 8, 16, 17

Dun & Bradstreet, Inc. v. Greenmoss Builders,
472 U.S. 749 (1985) 6

First National Bank of Boston v. Bellotti,
437 U.S. 765 (1978) ..... passim

In re Primus,
436 U.S. 412 (1978) 19

Kasky v. Nike Inc.,
93 Cal. Rptr. 2d, 854 (Cal. App. 2000),
rev'd 27 Cal. 4th 939 (2002) 3

Kasky v. Nike Inc.,
27 Cal. 4th 939 (2002) 3

Linmark Associates, Inc. v. Township of Willingboro,
431 U.S. 85 (1977) 7, 9, 11, 12

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 9

Murdock v. Pennsylvania,
319 U.S. 105 (1943) 15

NAACP v. Clairborne Hardware Co.,
458 U.S. 886 (1982) 6, 16, 20

New York Times Co. v. Sullivan,

376 U.S. 254 (1964) 3, 8, 16, 23

Ohralik v. Ohio State Bar Association,
436 U.S. 447 (1978) 12

Riley v. Nat'l Federation of the Blind,
487 U.S. 781 (1988) 7, 1619, 22

Rubin v. Coors Brewing Company,
514 U.S. 476 (1995) 8, 10, 13

Thomas v. Collins,
323 U.S. 516 (1945) 16, 20, 21

Thornhill v. Alabama,
310 U.S. 88 (1940) ..... passim

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.,
425 U.S. 748 (1976) ..... passim

Whitney v. California,
274 U.S. 357 (1927) 11

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 15

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the ACLU has vigorously defended free speech rights and has appeared before this court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*.

STATEMENT OF THE CASE

This case involves a private attorney general lawsuit initiated by respondent, Marc Kasky, against Nike, Inc. (Nike) under California's unfair competition and false advertising laws. Although respondent alleged no damages that inured directly to him, he sought an order requiring Nike to disgorge all monies it earned in California as a result of its allegedly unlawful conduct, as well as a court-approved public information campaign to correct its alleged misstatements, and an injunction prohibiting future misrepresentations regarding working conditions under which Nike products are made.

Nike is a major international corporation that produces athletic shoes and apparel. Many of its products are produced in Southeast Asia under conditions which are alleged to be dangerous and inhumane. These allegations

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

against Nike are part of a broader public debate over the ethical responsibilities of multi-national corporations in bringing products to the market place.

Starting in 1996, the nature of Nike's labor practices became a subject of enormous public interest and scrutiny brought on by a well-organized human rights campaign. The ensuing controversy was widely reported in the media in this country and abroad, much of it harshly critical of Nike's corporate practices. The public attention led to calls for boycotts and demands for legislative action in an effort to influence Nike's practices.

It was only in response to these allegations that Nike began publicly answering its critics, defending its overseas practices, and denying claims that it was operating sweatshops under supposedly slave-labor conditions. Nike officials responded to the charges through press releases, letters to the editor and op-eds in newspapers around the country, and letters to presidents and athletics directors of major universities. Nike also "purchased" editorial advertisements – i.e., paid political advertisements, to report the findings of an independent review of its labor practices that it had commissioned and which had cleared Nike of any abuses. None of these statements directly proposed a commercial transaction or promoted Nike's products. Nike's statements do no more than refute the accuracy of the charges leveled against it or argue mitigating circumstances. The respondent alleged that, in the course defending its practices, Nike violated California law by making false statements of fact about its labor practices and about the working conditions in factories that make its products.

Nike demurred to the complaint as barred by the First Amendment because the allegations failed to hue to the distinction between commercial speech that proposes a transaction and other varieties of speech that are fully protected – including corporate speech. The Superior Court

agreed and the California Court of Appeal unanimously affirmed. *Kasky v. Nike Inc.*, 93 Cal. Rptr. 854 (Cal. App. 2000). The California Supreme Court granted review, and, treating the allegations of the complaint as true because the case was before it on a demurrer, reversed. *Kasky v. Nike Inc.*, 27 Cal. 4th 939, 45 P.3d. 243 (2002). In a 4-3 opinion, the court held that Nike's statements were commercial speech and, therefore, subject to restrictions on false and deceptive advertising. In two separate opinions, the dissenting judges took issue with the majority's conclusions that Nike's statements were commercial speech and would have treated the statements as fully protected under the First Amendment in order to insure a full and balanced debate on a matter of obvious public concern.

SUMMARY OF ARGUMENT

In our system of government, courts are not arbitrators of truthfulness or probity, except in cases involving product advertising or where reputational interests are at stake. This case does not fit within either of these categories – indeed *amici* take no position on the truthfulness of the statements made by Nike. But, we strongly believe that the dispute over Nike's overseas labor practices should be resolved through public debate and not in a courtroom. While the parties disagree on whether the California statute at issue imposes strict liability or requires some showing of fault, the respondent's position is extraordinarily far reaching. If Nike's speech here can be characterized as commercial, then it can presumably lead not only to civil liability, but also to an injunction prohibiting further "false or misleading" statements defending or discussing its overseas working conditions and practices. Just as this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), struck down a broad definition of libel that hobbled the First Amendment by shielding public officials from criticism and

discussion of their actions, so too in this case the Court should not allow First Amendment rights to be diluted through an expanded definition of commercial speech.

The decision of the California Supreme Court opens that door. Whether one focuses on the speaker or listener in the exchange, we do not believe that the speech at issue in this case can properly be treated as commercial speech – and subject to diminished First Amendment protection. Although this case involves a public relations campaign, Nike's interest in telling its side of the story in a nationwide debate focusing attention on alleged abuses at its overseas workplaces is no less entitled to full First Amendment protection than statements made by those who have leveled charges critical of Nike's employment practices. The public also has a compelling First Amendment interest in hearing a balanced debate. The rigid distinction between commercial and non-commercial speech adopted by the court below distorts that debate by holding one side of the dispute more accountable than the other for the accuracy of its statements based solely on the identity and economic interests of one of the speakers.

The government's interest in regulating product advertising is limited to protecting the consumer from the commercial aspects of the speech proposing a transaction and does not extend to the broader goal of suppressing all corporate speech or all speech having some commercial aspect. We do not dispute that information about Nike's labor practices may be important to many consumers and a factor in their purchasing decisions, but that is primarily because consumers are seeking to use their economic power to make a broader political and economic statement. This is the function of the marketplace of ideas in a free society. Thus, unlike many of the Court's decisions upholding limitations on commercial speech where the speech interest is subordinate to the economic transaction being proposed, here the commercial aspect is subordinate to the non-

commercial aspect of the speech. Moreover, this is true from the point of view of both the speaker, who seeks to be part of the public debate over its overseas practices, and the consumer who may seek to influence Nike's actions through its purchasing decisions.

The bright line distinction between fully protected speech with a subordinate commercial aspect and other types of commercial speech that do no more than propose a transaction is evident in the Court's many cases involving labor disputes, consumer boycotts, charitable solicitation, the sale of religious and political material, and the solicitation of clients for civil rights and other advocacy litigation. The lower court's formulation of the commercial/non-commercial speech distinction is also at odds with this Court's decisions giving full protection to corporate speech motivated by economic self interest. Where, as here, the listener's interest may involve the exercise of political choice, and is not limited to his interest in purchasing the best product for the best price, the First Amendment interests at stake are even greater.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976), is the seminal commercial speech case. There the Court explained that the rationale for extending First Amendment protection to commercial speech is to ensure that consumers have the information they need to buy safe products at competitive prices. But the rationale also defines the appropriate boundaries of the commercial speech doctrine and the enhanced government regulation it permits. The regulation at issue in *Virginia Pharmacy* banned prescription drug advertising. The consumer's interest in that information ended with the economic transaction. Here, the information at issue is valuable to consumers primarily because it enables them to use their economic buying power to pursue a larger political and societal goal. The use of economic power for political ends is both a traditional and an entirely legitimate

tactic. It is, nonetheless, a political tactic and the speech that informs it should be treated as political speech under the Court's First Amendment jurisprudence. Indeed, this Court has already recognized as much in the context of labor boycotts, *Thornhill v. Alabama*, 310 U.S. 88 (1940), and civil rights boycotts, *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982). Respondents do not quarrel with those decisions but see them as only a one way ratchet available to those challenging corporate practices and not to those who defend them. Such viewpoint discrimination is, of course, an anathema under the First Amendment. It also demonstrates how far afield the lower court decision strays from the traditional regulation of advertising – which involves almost by definition a one-sided communication (that invites no response) rather than the sort of public debate at issue here.

ARGUMENT

The Decision Below Improperly Extends the Commercial Speech Doctrine to Justify the Suppression of Speech in Violation of Core First Amendment Principles

"The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984). It is for that reason that debate on matters of public concern lies at the very heart of the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758-59 (1985); *Connick v. Meyers*, 461 U.S. 138, 145 (1983). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Connick*, 461 U.S. at 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). However, the debate on matters of public concern can fulfill its purpose in a democratic society only if it is free and unfettered. Under our constitution, "there in no such thing as a false idea. However

pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Bose Corp. v. Consumers Union* 466 U.S. at 504 (quoting *Gertz v. Roberts Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Thus, it is " '[t]he very purpose of the First Amendment...to foreclose public authority from assuming a guardianship of the public mind....'" *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

The constitutional value served by commercial speech is different. Commercial speech is protected to safeguard the consumer's interest in "the free flow of information and ideas." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); *accord Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 563 (1980); *Linmar Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977); *Virginia Pharmacy*, 425 U.S. at 764. With commercial speech it is the interest of the listener that is paramount, rather than that of the speaker.

In the present case, the challenged communications were part of a nationwide debate in which consumers were being asked to make a political choice about whether or not to boycott Nike products, and to think more broadly about the role and responsibilities of multinational corporations in a global economy. The timeliness and significance of that discussion is clear. *See Thornhill*, 310 U.S. at 102-03. It is equally clear from this Court's decisions that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values," and is entitled to special protection, *Connick*, 461 U.S. at 145 (quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. at 913-14), regardless of the economic self-interest that may motivate the speaker. *See Thornhill v. Alabama*, 310 U.S. at 102-03; *First National Bank of Boston v. Bellotti*, 437 U.S. 765, 791-92 (1978) ("the

people in our democracy are entrusted with the responsibility for judging and evaluating the merits of conflicting viewpoints"). Nike's First Amendment right to participate in this debate and defend its practices is qualitatively different from its interest in merely proposing a commercial transaction. *Bellotti*, 437 U.S. at 784-85; *Consolidated Edison Co. v. New York Public Service Commission*, 447 U.S. 530, 535 (1980) (The utility's "discussion of controversial issues strikes at the heart of the freedom to speak."). *See also Virginia Pharmacy*, 425 U.S. at 262-63 (recognizing that it has long been settled by *Thornhill* and other cases that the contestants in a labor dispute are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome). The offense to the First Amendment is heightened where, as here, the suppression of speech targets one side of the debate. *See Bellotti*, 435 U.S. at 785-86.

While we are of course mindful of the limits that may be placed on false or deceptive product advertising, *see Virginia Board of Pharmacy*, 425 U.S. at 771, those limits cannot justify the regulation of speech concerning public affairs unrelated to product sales. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan*, 376 U.S. at 269. The concerns that typically justify regulation of transaction-driven speech are completely absent in this case. In particular, there is little risk that this debate, which is taking place in the public arena and not at the point of sale, will lead consumers to "respond to the [alleged] falsehood before there is time for more speech and considered reflection...." *See Rubin v. Coors Brewing Company*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). For these reasons, the decision below should not be affirmed on the paternalistic grounds that the debate over Nike's practices cannot be

sorted out in the marketplace of ideas rather than in the courtroom.

In order to show how anomalous this case is we begin our analysis with a discussion of the Court's cases invalidating restrictions on product advertising that deprive the consumer of important product information that the state may not withhold. *Virginia Pharmacy*, 425 U.S. at 762; *Linmark*, 431 U.S. at 96-97; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Bolger v. Youngs Drugs Product Corp.*, 463 U.S. 60 (1983); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). What emerges from these cases is the principle that, while the government can insist that information related to the transaction be truthful and non-misleading, there remains a significant measure of First Amendment protection even for speech involving core product advertising, which does no more than propose a commercial transaction. *Central Hudson*, 447 U.S. 557.

In *Bigelow v. Virginia*, 421 U.S. 809, 825-26 (1975), the Court held that it is error to assume that commercial speech is entitled to no First Amendment protection or that it was without value in the marketplace of ideas. Subsequently, in *Virginia Bd. of Pharmacy, supra*, the Court expanded on its holding in *Biglow* and held that the state's blanket ban on advertising prescription drugs violated the First Amendment. The Court asserted that a "particular consumer's interest in the free flow of commercial information... may be as keen, if not keener by far, than his interest in the day's most urgent political debate," 425 U.S. at 763, and that "the proper allocation of resources" in our free enterprise system requires that consumer decisions be "intelligent and well informed." *Id.* at 765. The Court also explained that, unless consumers are kept informed about the operations of the free market system, they cannot form "intelligent opinions as to how the system ought to be regulated or altered." *Id.*

The opinion further explained that the State's paternalistic assumption that consumers will use commercial information unwisely cannot justify its decision to suppress it:

> There is of course an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id. at 770.

The Court reiterated this concern with the free flow of information in *Bates v. State Bar of Arizona*, 433 U.S. at 364-65 (rejecting the state's "paternalistic" approach that suppresses information in an effort to control consumer choices); *Central Hudson*, 447 U.S. at 561-62 ("[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information"); and in *Bellotti*, 435 U.S. at 783 ("[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interests in the 'free flow of commercial information'") (quoting *Virginia Pharmacy*, 425 U.S at 764). In *Rubin v. Coors Brewing Co.*, the Court recently reaffirmed the importance of "the free flow of commercial information" and repeated the observation of *Virginia Pharmacy* that the citizen's interest in such information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 514 U.S. at 481-82.

On the basis of these principles, the Court has uniformly struck down several broadly based bans on

commercial speech, each of which served ends unrelated to consumer protection. Indeed, one of those cases expressly likened the rationale that *Virginia Bd. of Pharmacy* employed to the one that Justice Brandeis adopted in his concurrence in *Whitney v. California*, 274 U.S. 357 (1927). *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 97. In *Whitney*, Justice Brandeis wrote, in explaining his objection to a prohibition of *political* speech, that "the remedy to be applied is more speech, not enforced silence." 274 U.S. at 377; *see also Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (applying test for suppressing political speech set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

In case after case following *Virginia Bd. Of Pharmacy*, the Court has continued to stress the importance of the free dissemination of information about commercial choices in a market economy; the anti-paternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decision making; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly. *44 Liquormart Inc.*, 517 U.S. at 520 & n.2 (Thomas, J., concurring in judgment) (collecting cases). In this way, limits on commercial speech hinder not only consumer choice, but also the debate over central issues over public policy. *Id.* at 503.

At the same time, however, the Court's cases recognize that the state may protect the consumer by regulating commercial advertising more freely than other forms of protected speech. Thus, the state may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it from being deceptive," *Virginia*

Bd. of Pharmacy, 425 U.S. at 772 n.24, and may restrict some forms of aggressive sale practices that have the potential to exert undue influence over consumers, *Bates*, 433 U.S. at 366. Cases after *Virginia Bd. of Pharmacy* and *Bates* explained that the state's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is linked to inextricably to those transactions. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456-57 (1978) (stating that "in person solicitation by a lawyer over remunerative employment is a business transaction in which speech is an essential but subordinate component.") Nevertheless, as the Court explained in *Linmark*, the state retains less regulatory authority when its commercial speech restrictions strike at "the substance of the information communicated" rather than the "commercial aspect of [it] – with offerors communicating offers to offerees." 431 U.S. at 96; *Carey v. Population Services Int'l*, 431 U.S. at 701 n.28.

When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, it does so for reasons related to the preservation of a fair bargaining process. *44 Liquormart Inc.*, 517 U.S. at 501. It is the state's interest in protecting consumers from "commercial harms" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than non-commercial speech." *Id.* at 502 (quoting *Cincinnati v. Discovery Network Inc.*, 507 U.S. at 426). The state does not possess a similar interest in protecting its citizens from even false or misleading speech that is part of a broad public policy discussion rather than narrowly focused on a specific economic transaction:

> Transaction driven speech usually does not touch upon a subject of public debate, and thus misleading statements in that context

> are unlikely to engender the beneficial public discourse that flows from political controversy.... The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.

Rubin, 514 U.S. at 496 (Stevens, J., concurring).

When a state regulates commercial messages to protect consumers from misleading or deceptive sales practices, the purpose of its regulation must be consistent with the reasons for according less constitutional protection to commercial speech. *44 Liquormart*, 517 U.S. at 501. Conversely, when a state prohibits the dissemination of commercial messages for reasons unrelated to the elimination of an unfair bargaining practice, there is far less reason to depart from the rigorous review that the First Amendment generally demands. *Id.* In all other cases, speech is not placed beyond the outer limits of the First Amendment's broad protective umbrella merely because the statement may include the kind of alleged inaccuracy that, for better or worse, is commonplace in the robust public debate. *Bose Corp. v. Consumers Union*, 466 U.S. at 513. "[E]rroneous statement is inevitable in free debate, and...must be protected if the freedoms of expression are to have the 'breathing space they 'need....to survive.'" *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. at 271-72). The challenged statements do not concern the price or safety of any Nike product, nor are they even alleged to provide any misleading information about the product's essential purpose or function. Absent these considerations,

there is no justification for treating Nike's statements as transaction driven speech.

The statements made in this case clearly address matters of public concern in which the commercial aspect is an essential – but subordinate – component. It makes no sense to provide that speech less than full constitutional protection because Nike, itself, is the subject of the speech. In *Connick*, 461 U.S. at 147-48, this Court held that the question of whether a government employee's speech involves a matter of public or private concern can be determined by examining the content, form, and context of the speech. These criteria are equally relevant here and, both individually and collectively, undermine the commercial speech label affixed to Nike's speech by the lower court. Nike's challenged communications were a part of a heated, nationwide discussion about the conditions under which Nike products are manufactured abroad and about whether Nike was acting responsibly in addressing those working conditions. For the most part, the discussion was carried out in the public media in which two opposing points of view were heard. Like contestants in a labor dispute, both sides have First Amendment rights when they express themselves in order to influence its outcome. *Virginia v. Bd. of Pharmacy*, 425 U.S. at 762-63 (discussing *Thornhill* and other cases). The debate, here, was precisely the sort of give and take, charge, response, and counter-charge that we typically think of as political discourse. In such situations, it is up to the court of public opinion, not a court of law, to choose sides. *See First National Board of Boston v. Bellotti*, 435 U.S. at 785-86, 791-92.

The California Supreme Court's reliance on *Bolger v. Young*, 463 U.S. 60 (1983), to justify its characterization of Nike's speech as commercial speech is flawed for several reasons. First, *Bolger* did not purport to adopt a general definition of commercial speech. To the contrary, the Court has candidly acknowledged that the line between

commercial and noncommercial speech rests more on "common sense," *Central Hudson*, 447 U.S. at 561, then on "precise boundaries." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 637 (1985). Second, the facts of *Bolger* are readily distinguishable. Properly understood, *Bolger* is a case about pretext. The corporate speaker in that case manufactured Trojan brand condoms. It sent a mass mailing to the public discussing the use of contraceptives and the prevention of venereal diseases. The corporate communication was not issued in response to an ongoing debate about corporate practices. Rather, the Court concluded that it was a thinly veiled effort to market specific corporate products that were identified and promoted in its pamphlet.[2] Here, Nike's speech did not "simply…include[] references to public issues." *Bolger*, 463 U.S. at 68. On the contrary, Nike's products were the public issue. Third, even in *Bolger*, the Court noted that the mere fact that speech takes the form of an advertisement, or refers to a products, or is economically motivated, does not mean that it can or should be characterized as commercial speech. *Id.* at 66-67. And while the presence of all three factors in *Bolger* justified the commercial speech label, *id.* at 67, nothing in *Bolger* suggests this must always be so, especially if (as here) the political aspect of the speech predominates for both speaker and listener. Finally, both before and after *Bolger*, this Court has held that the commercial speech doctrine does not apply when political and commercial speech are inseparable because any other rule would fail to provide political speech with the breathing room it needs to survive. *See, e.g., Murdock v.*

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[2] *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474-75 (1989) ("Including home economics discussion as part of "Tupperware" party does not convert commercial speech into educational speech any more than "opening sales presentations with a prayer or Pledge of Allegiance would convert them into religious or political speech").

Pennsylvania, 319 U.S. 105, 111 (1943); *Thomas v. Collins*, 323 U.S. 516, 534-36 (1945); *Riley,* 487 U.S. at 796.

In a participatory democracy, the First Amendment does not allow the government to substitute its judgment for the judgment of the people in evaluating conflicting arguments on matters of public concern. *Bellotti,* 435 U.S. at 791-92. The state is no more free here to interfere with that choice on the grounds that Nike's statements relate to and further its commercial interests than it could interfere with a consumer boycott targeting retail stores that engage in racial discrimination. *See Clairborne Hardware Co., supra.* The state's paternalistic instincts in this case are simply misplaced and have consistently been rejected by the Court in its commercial and corporate speech cases, let alone in cases involving core political speech that had a an essential but subordinate commercial aspect. *See Bellotti, supra; Consolidated Edison Co., supra; New York Times v. Sullivan, supra; Thornhill, supra.*

For example, in *Consolidated Edison Co.*, a public utility sought to promote nuclear power (and thereby its own economic interest) by including an insert with its monthly bill stating, among other things, that the benefits of nuclear power "far outweigh any potential risk" and that nuclear power plants are "safe, economical, and clean." 447 U.S. at 532. An environmental organization asked the Public Service Commission to require the public utility to include materials providing an opposing point of view on the issue. Instead, the Commission adopted a flat prohibition on the discussion of political issues in bill inserts, "including the desirability of future development of nuclear power." *Id.* The New York Court of Appeals upheld the ban against a First Amendment challenge and this Court reversed. The Court never once considered the possibility that the ban was merely a regulation of commercial speech, even though the public utility had an obvious stake in the debate. Rather, the Court held: "The Commission has limited the means by

which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak." *Id.* at 535.

The Supreme Court's decision in *Thornhill* presents a second compelling parallel. In *Thornhill*, the Supreme Court invalidated a ban on labor picketing. Although only economic interests were at stake, the Court was clear that this was the sort of communication that the First Amendment intended to protect:

> Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and the press, however, impairs those opportunities for public education that are essential to effective exercise of the power correcting error through the processes of popular government.

310 U.S. at 95. Indeed, the Court could have been writing about this very case when it said:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution...Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of

> popular government to shape the destiny of modern industrial society.

Id. at 102-03.

The constitutional error inherent in the lower court's treatment of Nike's communications as commercial speech, given the context of the public debate over Nike's practices and policies, is that it disqualifies Nike's speech from full First Amendment protection on the theory that Nike had an economic self-interest in the outcome of the debate. This Court has consistently rejected that approach. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti,* 435 U.S. at 777. *See also Virginia Bd. of Pharmacy*, 425 U.S. at 762-63 ("The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and employer are protected by the First Amendment when they express themselves on the merits of the dispute..."). *See also id.* at 762 (recognizing the right of pharmacists to speak on issues affecting the industry despite their economic interest in doing so.)

In *Bellotti,* the Supreme Court considered a Massachusetts statute that prohibited corporations from making campaign contributions in support or in opposition to a referendum unless the outcome would materially affect the property, business or assets of the corporation. The Court struck down the statute, rejecting the claim that corporations lack First Amendment rights. The Court noted that the critical issue was not whether corporations have First Amendment rights, but "whether [the statute] abridges expression that the First Amendment was meant to protect." 435 U.S. at 776. The Court found the statute to be "an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues..." *Id.* at 784. It went on to note: "Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 785-86 (footnote omitted).

In *Bellotti*, of course, the corporation was denied the right to speak on a matter of public importance because its interest in the issue was not considered "material." The lower court would impose just the opposite rule here. Plainly, Nike's economic interests were directly threatened by the ongoing consumer boycott of Nike products. However, a boycott was not the only possible result of the attacks on Nike. The public reports of human rights and labor organizations about the conditions under which Nike products were being produced were well-publicized in the national media. In addition, prominent columnists were calling for action to remedy abuses at the Asian workplaces where Nike products were manufactured. This widespread publicity could certainly influence public support for legislation or other forms of regulation at the state, national, or even international level. Such attempts to influence public opinion, with a view toward shaping governmental policies, is core political discourse. *Bellotti*, 435 U.S. at 777 n.12; *Thornhill*, 310 U.S. at 95; *cf. Riley,* 487 U.S. at 788 ("charitable solicitations 'involve a variety of speech interests....that are within the protection of the First Amendment,' and therefore have not been dealt with as 'purely commercial speech.'" (quoting *Village of Schaumburg v. Citzens for a Better Environment*, 444 U.S. 620, 632 (1980)); *In re Primus*, 436 U.S. 412 (1978) (client solicitation by public interest attorneys not the same as commercial offers of legal assistance from other attorneys because activities of public interest attorneys in soliciting clients intimately connected to the advancement of political beliefs and ideas).

The essential question in this case, simply put, is whether Nike's corporate status or economic interest in the subject matter deprives the proposed speech of what otherwise would be its clear entitlement to protection. *See Bellotti*, 435 U.S. at 778. The answer to that question must be no. As the *Bellotti* Court emphasized, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider making their judgment, the source and credibility of the advocate." *Id.* at 791-92 (footnote omitted).

Even to the extent that Nike's communications were intended to answer calls for a consumer boycott, its speech is not simply "commercial" speech any more than a consumer boycott could be considered simply "economic" action. Just as calls for a consumer boycott are protected concerted political action and speech, *NAACP v. Clairborne Hardware Co., supra*, so too are the answers to the charges.

This case not only typifies the circumstance where speech with a commercial aspect is subordinate to the non-commercial aspect, but also demonstrates the futility of attempting to separate the two. Nike's labor practices and policies, and in turn its products, are the public issue. In this respect, *Thomas v. Collins*, 323 U.S. 516, is perhaps most closely on point. In *Collins*, the Supreme Court was confronted with a Texas statute requiring labor organizers to register before soliciting workers to join a union. *Id.* at 522. Thomas, the national president of the United Auto Workers union, had come to Houston to address a mass union organizing meeting. *Id.* at 521. Texas authorities took the position that he was required to be licensed as a labor organizer. *Id.* n.3.

Although in his speech at the meeting Thomas specifically exhorted members of the audience to join the union, the Supreme Court nevertheless held that the statue

could not constitutionally be applied to him. *Id.* at 536-37. Rejecting the argument that Thomas' invitation to join the union was no more than a business transaction, *see* 323 U.S. at 556 (Roberts, J., dissenting), the Court concluded that, because it was impossible to separate his advocacy of unionism in general from a call to join the union, Thomas' right to speak could not be conditioned upon his obtaining an organizer's license. *Id.* at 534-36. "A speaker in such circumstances could avoid the words 'solicit,' 'invite,' 'join.' It would be impossible to avoid the idea." *Id.* at 534.

Justice Jackson, in his concurring opinion, recognized the authority of the state to protect the public from "those who seek for one purpose or another to obtain money." *Id.* at 545.

> But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us.

Id.

Thomas controls here. Implicit in any defense by Nike of its labor practices is the message that the charges against it should not deter someone from buying its products. As discussed above, however, that is not the only, or even the predominant, message of the communications at issue here. In these circumstances, the inevitable "commercial" subtext cannot convert communications that are, at core, elements of an ongoing public policy debate into commercial speech subject to government oversight and regulation. *See*

Riley, 487 U.S. at 796 ("we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech').

The danger to First Amendment values posed by respondent's suggestion that Nike's communications be treated as commercial speech can be better understood if we consider the consequences of doing so here. Taken together, the nine communication plaintiff challenges contain a wealth of information and argument. Here, respondent has picked out only six statements that claim to be false. Viewed in isolation, the claim that these statements must be tested for truthfulness may have some appeal. But once that claim is accepted, every sentence, every word in these documents becomes subject to challenge on the ground not only that it is false, but also that it is misleading. The choice of language, the use of example, the reasoning of each argument is thrown open to question. The conventional wisdom is that the chill of such scrutiny is not a concern in the realm of commercial speech. *See Bose Corp. v. Consumers Union*, 466 U.S. at 506 n.22. The *Bellotti* court, however, correctly pointed out the danger that exists when that rule is applied to public policy discourse:

> Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties – personal as well as corporate – provided for in [the statute]... [M]anagement never could be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue. In addition, the burden and expense of litigating the issue – especially when what must be established is a complex and amorphous economic

> relationship – would unduly impinge on the exercise of the constitutional right. "[T]he free dissemination of ideas [might] be the loser."

Bellotti, 435 U.S. at 785 n.21 (quoting *Smith v. California*, 361 U.S. 147, 151 (1959) (citations omitted)); *accord, New York Times v. Sullivan*, 376 U.S. at 279.

The discussion of public issues in this case lie at the heart of the principles that animate the First Amendment. The lower court was wrong to conclude that the discussion of these issues was being used merely as a subterfuge to avoid regulation as commercial speech.

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be reversed.

Respectfully Submitted,

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